MOHAN CHATRAM MT RAMCHANDANI v. KETUA PENGARAH INSOLVENSI WILAYAH PERSEKUTUAN KUALA LUMPUR

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[ORIGINATING SUMMONS NO: 24NCC-337-09-2014]
8 JANUARY 2015

COMPANY LAW: *Winding up – Proceedings against company – Party to proceedings – Whether Director General of Insolvency could be named as defendant – Non-compliance with s. 227(7) of Companies Act 1965 – Whether section employs mandatory term – Whether non-compliance curable – Companies (Winding Up) Rules 1972, r. 194(1)*

COMPANY LAW: *Winding up – Procedure – Plaintiff filed originating summons against wound up company – Whether leave from winding up court required – Whether plaintiff exempted from applying for leave – Whether non-compliance curable – Companies Act 1965, ss. 221(2)(b), 226(3) & 236(2) – Companies (Winding Up) Rules 1972, r. 194(1)*

CIVIL PROCEDURE: *Originating summons – Procedure – Action against wound up company – Whether leave of winding up court required before filing originating summons – Whether non-compliance curable – Whether injustice caused by allowing originating summons – Whether mere technical breach of Rules of Court 2012 – Companies Act 1965, ss. 221(2)(b), 226(3) & 236(2) – Companies (Winding Up) Rules 1972, r. 194(1)*

COMPANY LAW: *Winding up – Suit against company – Plaintiff sought order for completion of sale and purchase agreement by defendant – Whether plaintiff bona fide purchaser for valuable consideration – Whether plaintiff had caveatable interest – Whether failure to enter private caveat cast doubt on bona fides of plaintiff – Whether defendant obtained absolute assignment from bank – Failure to cite bank as party to proceedings – Whether plaintiff's prayers contravened pari passu principle – Companies Act 1965, s. 226(3)(a)*

The defendant purchased a parcel of shop office from the developer and sold it by way of a sale and purchase agreement ('SPA') to the plaintiff. The terms and conditions of the SPA were, *inter alia* (i) that the parcel had been assigned to Public Bank Bhd ('the bank'); (ii) the defendant acknowledged receipt of a deposit from the plaintiff; (iii) the SPA was conditional upon the defendant obtaining consent of the State Authority within six months and the plaintiff had the right to terminate the SPA if the consent was not obtained within the stipulated period or any extension thereof; and (iv) the plaintiff 'shall be entitled' to enter a private caveat in respect of the parcel immediately after the execution of the SPA. However, the defendant was subsequently wound up and the official receiver ('OR') was appointed as the liquidator. The plaintiff thus filed an originating summons ('OS') seeking (i) an order for the defendant to complete the SPA ('the first prayer'); (ii) the defendant be

allowed to use part of the price to pay one Mr Lim ('the second prayer'); and (iii) the plaintiff's payments be set off from the price ('the third prayer'). In his affidavit in support of the OS, the plaintiff alleged that Mr Lim had entered a private caveat over the parcel. The OR raised preliminary objections against the OS, *inter alia* (i) the plaintiff had named 'Ketua Pengarah Insolvensi Wilayah Persekutuan Kuala Lumpur (sebagai penyelesai sementara/likuidator bagi (defendant)' (the Director General of Insolvency ('DGI')). According to the OR, the plaintiff should have named the OR as the liquidator and not the DGI; and (ii) the plaintiff did not obtain leave of the winding-up court before the filing of OS.

Held (dismissing OS with costs):

(1) The first preliminary objection was well-founded as s. 227(7) of the Companies Act 1965 ('CA') employs the mandatory term 'shall' and therefore, the section has mandatory legal effect and cannot be circumvented by any letter from any party, including a letter from the DGI. Hence, the plaintiff could not rely on the OR's letter with the letterhead 'Jabatan Insolvensi Malaysia' to justify why he cited the DGI as the defendant. The doctrine of estoppel cannot bar the operation of a statutory provision. (paras 14 & 16)

(2) The second preliminary objection was also upheld as the plaintiff had clearly filed the OS without obtaining leave from the winding up court as required by s. 226(3)(a) of the CA. Further, s. 236(2) does not exempt the plaintiff from applying for leave of the winding up court (*Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd (formerly known as Boustead Trading (1985) Sdn Bhd*, dist). The requirement under s. 226(3) of the CA could not be unlawfully by-passed by reliance on s. 221(2)(b) of the CA and r. 194(1) of the Companies (Winding Up) Rules 1972 (the Rules') so as to cause injustice to all other unsecured creditors of the defendant. (paras 21, 24-26 & 50)

(3) The SPA, which was not an instrument of transfer, did not constitute a 'conveyance' or 'transfer' within the meaning of s. 53(1) of the Bankruptcy Act 1967. The SPA was executed more than six months before the presentation of the winding up petition against the defendant. Accordingly, the SPA was not an undue preference in the plaintiff's favour under s. 293(1) of the CA. (para 30)

(4) The court could not accede to the second prayer as allowing the second prayer would give Mr Lim an undue preference as his debts would be paid in priority over all the debts of the other unsecured creditors of the defendant. This would contravene the *pari passu* principle applicable to all unsecured creditors in a winding up. Further, had the plaintiff applied for leave of the winding up court to file the OS under s. 226(3)(a)

of the CA, it was likely that the winding up court would not grant leave as the second prayer would contravene the *pari passu* principle to the detriment of all the other unsecured creditors of the defendant. (paras 33 & 34)

(5) The bank should have been made a party in the OS as neither the plaintiff nor the defendant exhibited a copy of the assignment of the parcel from the defendant to the bank ('the assignment') and therefore, the actual scope of the assignment could not be ascertained. If the assignment was absolute in nature, the bank was the equitable and beneficial owner of the parcel. In such instance, it may be argued by the bank that the defendant had no equitable and beneficial interest in the parcel to sell to the plaintiff. The issue of competing equitable interest may also arise. (paras 37 & 39)

(6) Further, the bank had a contractual right to sell the parcel if the defendant had defaulted on the loan provided by the bank. In view of the defendant's winding up, there was every possibility of the defendant's default. It was also essential for both the plaintiff and the defendant to know how much was still outstanding from the defendant to the bank so as to enable the bank to reassign the parcel to the defendant. In the circumstances, the bank was a relevant party in the OS within the meaning of O. 15 r. 6(2)(b)(i) and (ii) of the Rules of Court 2012. (paras 40-42)

(7) The plaintiff claimed to be a *bona fide* purchaser of the parcel for valuable consideration and therefore the onus was on the plaintiff to prove it in accordance with s. 106 of the Evidence Act 1950. However, there was no evidence that the plaintiff had entered a private caveat in respect of the parcel as provided in the SPA and the failure cast a grave doubt on the *bona fides* of the plaintiff. In the circumstances, the plaintiff had failed to discharge the burden of proof. (paras 45 & 46)

(8) The first prayer was essentially seeking an order of specific performance of the SPA. To grant the first prayer without hearing the bank would clearly be unjust to the bank especially if the assignment was an absolute assignment. The plaintiff also had not adduced evidence that the SA's consent had been given to the SPA and the proposed transfer of the parcel from the defendant to the plaintiff. Nor did the plaintiff adduce evidence of any extension of the conditional period. With the defendant's winding up, s. 233(1) of the CA vests the parcel in the OR. Hence, the court refused to exercise its discretion under s. 21(1) of the Specific Relief Act 1950 to order a specific performance of the SPA. (para 47)

(9) If the plaintiff was a *bona fide* creditor to the defendant, the plaintiff may file proof of debt ('POD') in respect of the deposit and the plaintiff's payments with the OR pursuant to r. 78 of the Rules. The OR as the

liquidator will examine the plaintiff's POD in accordance with r. 92 and if the plaintiff's POD was rejected by the OR the plaintiff has a right of appeal to the winding up court under r. 93 of the Rules. (para 49)

Case(s) referred to:

Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC ***(refd)***

Commercial Banking Co of Sydney Ltd v. George Hudsons Pty Ltd (in liquidation) [1973] 2 ALR 1 ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***

GKM Amal Bhd v. Bank Utama (Malaysia) Bhd [2004] 1 CLJ 769 CA ***(dist)***

Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41 SC ***(refd)***

K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors [2005] 1 CLJ 793 FC ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(refd)***

Lian Keow Sdn Bhd (In liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(dist)***

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(refd)***

Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 LNS 96 FC ***(refd)***

Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals [2012] 2 CLJ 501 FC ***(refd)***

Paruvathy Palany v. Sathiasealan Govindasamy [1999] 6 CLJ 113 HC ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***

PP v. Yap Min Woie [1995] 4 CLJ 692 FC ***(refd)***

Puran Singh v. Kehar Singh Bahadur Singh [1937] 1 LNS 51 HC ***(refd)***

Sistem Kawalan Sekutu v. Institut Teknologi Jaya Sdn Bhd [2014] 1 LNS 774 HC ***(refd)***

Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd [2010] 3 CLJ 785 FC ***(dist)***

Legislation referred to:

Bankruptcy Act 1967, ss. 53(1), 70(1)

Companies (Winding Up) Rules 1972, rr. 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 99, 101, 194(1)

Companies Act 1965, ss. 221(2)(b), 226(3)(a), 227(7), 233(1), 236(2), 293(1)

Evidence Act 1950, s. 106

Legal Profession (Practice and Etiquette) Rules 1978, rr. 3(a), (b)(i), 4, 5(a)

National Land Code, ss. 5, 214(1), (2)(b), 323(1)(a)

Rules of Court 2012, O. 1A, O. 2 rr. 1(1), (2), (3), O. 7 rr. 2(2), (3), O. 15 r. 6(2)(b)(i), (ii), O. 34 r. 1(1)(b),

Specific Relief Act 1950, s. 21(1)

For the applicant - Mohd Nurhazman Nurham; M/s JP Chong & Co

For the respondent/liquidator - Nurul Aziani (Noormazlinah Abdul Taib with her); Jabatan Insolvensi Malaysia

Reported by S Barathi

JUDGMENT

Wong Kian Kheong JC:

Introduction

[1] This case discusses, among others, the following issues:

(a) whether a purchaser ('purchaser') of property owned by a company which is subsequently wound up, can file an action to claim for specific performance of the sale of property without obtaining leave of the winding up court under s. 226(3)(a) of the Companies Act 1965 ('CA'); and

(b) whether the purchaser's application to set off from the sale price a debt due from the wound up company to a person who has entered a private caveat over the property ('caveator'), constitutes an undue preference in favour of the caveator.

Wrong Description Of Parties

[2] In this originating summons ('OS'), the solicitors who filed the OS, Messrs JP Chong & Co ('Messrs JPC') used the terms "applicant" and "respondent" to describe the parties. With respect, the right terms should be "plaintiff" and "defendant" as stated in O. 7 r. 2(2) of the Rules of Court 2012 ('RC'). According to O. 7 r. 2(3) RC, only a party who files an *ex parte* OS, should be described as an "applicant". I reproduce O. 7 rr. 2(2) and (3) RC as follows:

> 7.(2) The party taking out an originating summons, other than an *ex parte* originating summons, shall be described as a plaintiff, and the other parties shall be described as defendants.
>
> (3) The party taking out an *ex parte* originating summons shall be described as the applicant.

[3] In accordance with O. 7 r. 2(2) RC, this court will use the terms "plaintiff" and "defendant".

Facts

[4] The defendant company ('defendant') purchased a parcel of shop office ('parcel') from Jeramuda Properties Sdn Bhd ('developer').

[5] The defendant sold the parcel to the plaintiff ('plaintiff') by way of a sale and purchase agreement dated 5 August 2013 ('SPA').

[6] The following terms and conditions of the SPA are relevant to the OS:

(a) recital "E" ('Recital E') states that the parcel has been assigned to Public Bank Bhd ('bank');

A (b) clause 1.1 states that the plaintiff has purchased the parcel from the defendant for a sum of RM650,000 ('price'). According to cl. 2.1, the defendant acknowledged receipt of a deposit of RM65,000 ('deposit') from the plaintiff;

B (c) clause 1.2(b) provides that the SPA is conditional upon the defendant obtaining the consent of the State Authority ('SA') for the SPA and the transfer of the parcel to the plaintiff. The SA's consent is required by cl. 1.3 to be obtained within six months from the date of the SPA ('conditional period'). According to cl. 1.5, the plaintiff has the right to terminate the SPA if the SA's consent is not obtained within the C conditional period or any extension of the conditional period; and

(d) according to cl. 7.2, immediately after the execution of the SPA, the plaintiff "shall be entitled" at the plaintiff's own cost to enter a private caveat in respect of the parcel ('cl. 7.2').

D **[7]** A winding up petition was presented on 27 March 2014 against the defendant. On 23 May 2014, the Kuala Lumpur High Court wound up the defendant and appointed the Official Receiver ('OR') as the defendant's liquidator ('liquidator').

[8] The plaintiff's affidavit in support of the OS ('plaintiff's affidavit') E alleged the following:

(a) one Mr Lim Haw Sek ('Mr Lim') has entered a private caveat over the parcel. The plaintiff's affidavit exhibited two letters dated 27 January 2014 as follows:

F (i) a letter from Mr Lim's solicitors, Messrs Chan & Associates ('Messrs CA'), to the plaintiff's former solicitors, Messrs Ashok Puri Hanifah & Co ('Messrs APH'), which stated, among others:

> 2. To facilitate the perfection of transfer from the Developer to [Defendant], we enclose our client's written consent under G s. 322(5)(b) of the National Land Code [NLC].
>
> 3. We understand that upon the transfer, the existing loan from [Bank] will be redeemed; and

(ii) a letter from Mr Lim to the Selangor Registrar of Titles which stated, among others:

H
> Saya sebagai pemegang Kaveat Persendirian No. Perserahan: 2826/2013, Jilid No.: -, Folio No.: - yang didaftarkan pada 03.04.2013 dengan ini tiada apa-apa halangan dan memberi kebenaran di bawah Seksyen 322(5)(b) Kanun Tanah Negara untuk pendaftaran suratcara Pindahmilik:
>
> I DARIPADA: LYL Land Sdn Bhd (Pemaju) atau Jeramuda Properties Sdn Bhd (Pemunya)
>
> KEPADA: [Defendant]
>
> Sebelum Kaveat itu ditarikbalik [sic].;

(b) Messrs APH wrote a letter dated 12 June 2014 to the OR ('letter dated 12 June 2014 from Messrs APH') which stated, among others:

> *… We had also been informed by the [Defendant] that there had been a private caveat lodge [sic] on the [Parcel] as a result of the [Defendant] owing the Caveator a sum of RM270,000.00. This was confirmed by the Caveator's Solicitors, [Messrs CA] via their letter dated 04/09/2013, a copy of which is enclosed herewith for your attention.*
>
> …
>
> *The [Defendant's] Solicitors, [Messrs JPC] had obtained the blanket consent in favour of the [Defendant] and had proceeded to present the first transfer to register the [Defendant] as the registered owner of the [Parcel].*
>
> …
>
> *Please be informed that the [Plaintiff], at the request of one of the [Defendant's] directors, namely Mr. Ng Chin Chye who have [sic] since passed away, had agreed to pay for first transfer charges, bank instalments and etc for the [Parcel]. … Enclosed is a copy of the payments list that has been paid by the [Plaintiff] on behalf of the [Defendant] thus far.*
>
> (emphasis added);

(c) the OR replied to the "letter dated 12 June 2014 by Messrs APH" by informing Messrs APH to obtain a court order ('OR's letter'). The letterhead of OR's letter stated "Jabatan Insolvensi Malaysia"; and

(d) the plaintiff has made the following payments on behalf of the defendant ('plaintiff's payments'):

(i) the defendant's loan instalments to the bank; and

(ii) management fees and related charges in respect of the parcel which are due from the defendant to the company managing the building wherein the parcel was situated.

Relief Claimed In OS

[9] In the OS, the plaintiff prayed for, among others, the following relief:

(a) an order for the defendant to complete the SPA ('first prayer');

(b) the defendant be allowed to use part of the price to pay Mr Lim ('second prayer'); and

(c) the plaintiff's payments to be set off from the price ('third prayer').

OR's Two Preliminary Objections

[10] The OR raises the following two preliminary objections against the OS:

(a) in the OS, the plaintiff has named "Ketua Pengarah Insolvensi Wilayah Persekutuan Kuala Lumpur (sebagai penyelesai sementara/likuidator bagi (defendant)" (the Director General of Insolvency ('DGI')).

A According to the OR, the plaintiff should have named the OR as the liquidator and not the DGI ('first PO'); and

(b) before the filing of the OS, the plaintiff did not obtain leave of the winding up court ('second PO').

B **How Should Preliminary Objections Be Decided?**

[11] In deciding the two PO's, I adopt the following *dicta* by Gopal Sri Ram JCA (as His Lordship then was) in the Court of Appeal case of *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248, at 256; [2001] 4 MLJ 187, at 195:

C

> There is a trend – and it is an unhealthy trend – for practitioners to raise several points either on several different applications, or by way of preliminary objections on procedural grounds to the same proceeding. As each application or point of objection fails, an appeal is at once lodged, and the aid of this court is sought to stay all proceedings in the court below pending the hearing of the appeal against the spurious procedural objection. Let me say at once that such a practice constitutes an abuse of the court's process, leads to injustice and should not be countenanced by judges. *A litigant who has a number of procedural and substantive grounds in opposition to any cause or matter, must take all of them in one go. He cannot present his case in instalments. He cannot take one procedural point at a time and invite a separate ruling from the presiding judge. This type of advocacy which has been on the rise over the past few years results in serious delays in the various stages of litigation. Judges at first instance and magistrates are therefore advised not to entertain these so called preliminary objections, save and except where they go to the jurisdiction of the particular court*.
>
> (emphasis added)

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E

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[12] The above *dicta*, in my view, is consistent with O. 34 r. 1(1)(b) RC to "secure the just, expeditious and economical disposal" of cases.

First PO

G **[13]** Section 227(7) CA provides as follows:

> 227. **The following provisions with respect to liquidators shall have effect on a winding up order being made:**
>
> …
>
> (7) a liquidator shall be described, where a person other than the Official Receiver is liquidator, by the style of "the liquidator", and, *where the Official Receiver is liquidator, by the style of "the Official Receiver and liquidator", of the particular company in respect of which he is appointed, and not by his individual name*.
>
> (emphasis added).

H

I

[14] By virtue of s. 227(7) CA, I find that the first PO is well taken. Furthermore, s. 227 CA employs the mandatory term "shall". In *PP v. Yap Min Woie* [1995] 4 CLJ 692, at 695; [1996] 1 MLJ 169, at 172-173, the Federal Court gave effect to the mandatory term "shall". A

[15] It is to be noted that Part 10 CA (ss. 211-318 CA) which provides for winding up of companies, does not use the term "DGI". The DGI is an officer appointed by the Minister pursuant to s. 70(1) of the Bankruptcy Act 1967 ('BA'). B

[16] The plaintiff relies on, among others, the OR's letter with the letterhead "Jabatan Insolvensi Malaysia", to justify why the plaintiff cited the DGI as the defendant. With respect, I cannot accept this contention. As explained above, s. 227(7) CA has mandatory legal effect and cannot be circumvented by any letter from any party, including a letter from the DGI. It is clear that the doctrine of estoppel cannot bar the operation of a statutory provision. In *Puran Singh v. Kehar Singh Bahadur Singh* [1937] 1 LNS 51; [1939] 1 MLJ 71, at 75, Thomas CJ in the Court of Appeal of the Federated Malay States, held as follows: C D

> The main question argued at the appeal was that the learned trial Judge having held that the registration of Kehar Singh as proprietor of certain lands had been obtained by means of an insufficient or void instrument, *viz*., an invalid power of attorney, and that it was in consequence void under section 42 (iii) of the Land Code, he was wrong in holding that the plaintiff was estopped by his conduct from objecting to the registration. In support of this contention he cited *Borrow*'s case (1880) 14 Ch D 432 in which it is stated by Bacon, V.C., in the course of his judgment that: E F
>
> > *the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter partes and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament.*
>
> This view is followed in the case of *Abdul Aziz v. Kanthen Mallik* 38 ILR Cal 512 515 in which at page 515 a long list of authorities has been set out. *The Court there decided that it was not prepared to accede to the argument that the principle of estoppel overrides the provisions of either section 78 of the Land Registration Act or section 60 of the Bengal Tenancy Act. …* G
>
> *So far as this is an argument on the question of estoppel it cannot in my opinion succeed, since it is only another way of saying that acts of the parties inter se can amount to an estoppel in respect of an Enactment*. H
>
> (emphasis added)

[17] I will discuss later in this judgment the effect of the non-compliance with s. 227(7) CA. I

A

Second PO

[18] Section 226(3) CA is relevant to the second PO:

> 226.(3) **When a winding up order has been made** or a provisional liquidator has been appointed **no action or proceeding shall be proceeded with or commenced against the company except**:
>
> (a) **by leave of the Court**; and
>
> (b) **in accordance with such terms as the Court imposes**."
>
> (emphasis added)

[19] In *Sistem Kawalan Sekutu v. Institut Teknologi Jaya Sdn Bhd* [2014] 1 LNS 774; [2014] AMEJ 887, at para. 17, I have stated as follows:

> E. Why leave of winding up court under s. 226(3) CA is required?
>
> 17. If there is a pending action against a wound up company, the necessity to obtain leave of the winding up court under s. 226(3) CA has been explained in the following cases:
>
> (a) in *Mosbert Bhd (in liquidation)*, at p. 447, the Supreme Court explained as follows:
>
> > … primary object of winding up is the collection and distribution of the assets of the company *pari passu* amongst unsecured creditors after payment of preferential debts. And the *purpose of [s. 226(3) CA] is to ensure that all claims against the company in liquidation which can be determined by the cheap and summary procedure available in a winding up are not made the subject of expensive litigation. The provision is designed to prevent unnecessary multiplicity of suits which may result in dissipating the assets of the company*.
> >
> > (emphasis added);
>
> (b) the High Court held in *Watta Battery Industries Sdn Bhd v. Uni-Batt Manufacturing Sdn Bhd (Chow Siew Hon & Ors, interveners)* [1993] 1 MLJ 149, at 159-160:
>
> > The philosophy … for leave to be obtained before proceeding with or commencing an action or proceeding (s. 226(3)) … is to bring into one forum all actions and proceedings against the company so that they can conveniently and expeditiously be dealt with, while minimizing costs, and prevent a multiplicity of actions which may result in the assets of company being dissipated. This is 'the winding-up workshop' referred to in *Re Canada Western Steel Co*"; and
>
> (c) the Supreme Court of Queensland, Australia, held in *Ogilvie-Grant v. East as liquidator of Gordon Grant and Grant Pty Lte (in liquidation)* (1983) 1 ACLC 742, at 744, that the effect of the provision in Queensland's Companies Act 1961 (which is similar

to our s. 226(3) CA) is to require a claimant against a wound up company to lodge a proof of debt (POD) with the liquidator unless that claimant can demonstrate that there is some good reason why a departure from that procedure is justified in the case of that particular claim. It is to be noted as our CA is based on Australian legislation, Australian cases are highly persuasive; and

(d) in *Korea Asset Management v. Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR 671, at 682, paras 36-37, the Singapore High Court held in an application for leave to present a winding up petition against a company which had been voluntarily wound up:

> 36. The rationale for these provisions is axiomatic: it is to prevent the company from being further burdened by expenses incurred in defending unnecessary litigation. The main focus of a company and its liquidators once winding up has commenced should be to prevent the fragmentation of its assets and to ensure that the interests of its creditors are protected to the fullest extent. In other words, returns to legitimate creditors should be maximised; the process of collecting assets and returning them to legitimate creditors should be attended to with all practicable speed. Unnecessary costs should not be incurred; liquidators should act in the collective interests of all legitimate stakeholders and not with a view to enhancing their own self-interests or fees.
>
> 37. This statutory ring-fencing of the company also acts as a strong disincentive to creditors inclined to scramble to the judgment finishing line, in the often mistaken belief that their priority will be enhanced.
>
> It is to be noted that our s. 226(3) CA is in *pari materia* with the provision in the Singapore Companies Act.
>
> (emphasis added)

[20] According to the cases cited in *Sistem Kawalan Sekutu*, s. 226(3) CA has four purposes, namely:

(a) to prevent dissipation of the assets of the wound up company to the detriment of the company's unsecured creditors and contributories;

(b) to ensure that the wound up company's assets are distributed *pari passu* among the company's unsecured creditors. In other words, no unsecured creditor of a wound up company should get an undue preference over the other unsecured creditors of the company;

(c) to ensure that all claims against a wound up company can be resolved by its liquidator by way of a less costly, speedier and more convenient procedure in the form of the liquidator's examination of proof of debts

('POD') filed by all the company's creditors as provided in rr. 78 to 92, 94, 96, 99 and 101 of the Companies (Winding Up) Rules 1972 ('WUR'); and

(d) to prevent an unnecessary multiplicity of suits against the wound up company by the company's creditors.

[21] It is clear in this case that the OS has been filed without the plaintiff obtaining leave from the winding up court as required by s. 226(3)(a) CA.

[22] The plaintiff relies on s. 236(2) CA and the Federal Court's judgment in *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785; [2010] 2 MLJ 749, to contend that no leave from the winding up court is required before the OS is filed.

[23] Section 236(2) CA provides as follows:

236. Powers of liquidator

…

(2) The liquidator may:

(a) bring or defend any action or other legal proceeding in the name and on behalf of the company;

(b) compromise any debt due to the company other than calls and liabilities for calls and other than a debt where the amount claimed by the company to be due to it exceeds one thousand five hundred ringgit;

(c) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;

(d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary the company's seal;

(e) prove rank and claim in the bankruptcy of any contributory or debtor for any balance against his estate, and receive dividends in the bankruptcy in respect of that balance as a separate debt due from the bankrupt and rateably with the other separate creditors;

(f) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;

(g) raise on the security of the assets of the company any money requisite;

(h) take out letters of administration of the estate of any deceased contributory or debtor, and do any other act necessary for obtaining payment of any money due from a contributory or debtor or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall for the purposes of enabling the liquidator to take out the letters of administration or recover the money be deemed due to the liquidator himself;

(i) appoint an agent to do any business which the liquidator is unable to do himself; and

(j) do all such other things as are necessary for winding up the affairs of the company and distributing its assets.

[24] With respect, I fail to see how s. 236(2) CA may exempt the plaintiff from applying for leave of the winding up court under s. 226(3) CA.

[25] *Zaitun Marketing Sdn Bhd* can be easily distinguished from this case. The material facts of *Zaitun Marketing Sdn Bhd* are as follows:

(a) the appellant company filed a suit against the respondent company;

(b) while the suit was pending, the appellant company was wound up; and

(c) the OR as the appellant company's liquidator, granted permission to a director of the appellant company to continue the suit ('OR's consent').

In *Zaitun Marketing Sdn Bhd*, at pp. 756-757, Gopal Sri Ram FCJ held that the OR's consent was not valid as the OR could only authorise a creditor or contributory of the wound up company (not the company's director) to continue the suit. *Zaitun Marketing Sdn Bhd* is not concerned with a suit against a wound up company. Hence, the application of s. 226(3) CA does not arise in *Zaitun Marketing Sdn Bhd*.

[26] For the above reasons, I uphold the second PO. As to the effect of this successful second PO, I will discuss this later in this judgment.

Was Plaintiff Given Undue Preference By Way Of SPA?

[27] Section 293 CA reads as follows:

293. Undue preference

(1) **Any transfer**, mortgage, delivery of goods, **payment**, execution *or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall, in the event of the company being wound up, be void or voidable in like manner*.

(2) For the purposes of this section *the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be*:

(a) **in the case of a winding up by the Court:**

(i) **the date of the presentation of the petition**; …

(emphasis added)

[28] Section 293(1) CA applies the "undue preference" provision in s. 53 BA. The relevant part of s. 53 BA is reproduced below:

> 53.(1) **Every conveyance or transfer of property** or charge thereon made, **every payment made, every obligation incurred** and every judicial proceeding *taken or suffered by any person unable to pay his debts, as they become due, from his own money in favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same and every such act shall be deemed fraudulent and void as against the [DGI]*.
>
> (2) *This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt*.
>
> (emphasis added)

[29] In *Lian Keow Sdn Bhd (In liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44; [1988] 2 MLJ 449, at 452, 453, 455, Seah SCJ delivered the Supreme Court's judgment as follows:

> In my opinion, **section 53 [BA] is imported into a winding up proceeding of a company by section 293(1) [CA]** …
>
> **In short, the rules of bankruptcy as to fraudulent preference are applied to the winding up of the company by the court by section 293(1) [CA]**.
>
> I think it appropriate at this stage to refer to what Bacon V.C. said about this subject. Speaking of section 164 of the English Companies Act 1862 which is the forerunner of section 320 of the English Companies Act 1948 (ours is section 293 [CA]) in the case of *Willmott v. London Celluloid Co* (1886) 31 Ch D 425 Bacon V.C. said (at p. 434):
>
> > The 164th section, however, relates only to a case similar in all respects to that which would arise in bankruptcy, and the very words of the 164th section put this beyond the possibility of doubt. This Act of Parliament, dealing as it does with an insolvent company, that is, a bankrupt company, and making provision for the benefit of the creditors, of the shareholders, and of all other persons interested, declares by the 164th section that a fraudulent preference shall be set aside and held to be void for the benefit of the creditors – that is, the creditors in the winding up. No other persons have any right to raise the question of fraudulent preference …
>
> Earlier on, Bacon V.C. observed that:
>
> > In bankruptcy, and only in bankruptcy as far as I know, the doctrine of fraudulent preference found a place in the jurisprudence of this country. A winding up is, in point of fact, a bankruptcy, and the doctrine is also applicable to a winding up. …

In short, section 53(1) renders void as against the Official Assignee a transfer of property, by a person who is unable to pay his debts as they become due from his own money, in favour of a creditor as this transfer shall be deemed as giving that creditor a fraudulent preference over the other creditors if that person is adjudged a bankrupt within six months after the making of the transfers. …

As regards the phrase "every transfer of property made by any person" used in section 53(1), I think these words "any person" ought to be given a liberal interpretation. In my opinion, the transfer of the property may be signed by the bankrupt as well as by his trustee or agent on his behalf provided always that the beneficial interest in the property is vested in the bankrupt at the material time. Otherwise, the bankrupt could easily defeat the just claims of the Official Assignee by registering his property in the name of a third party. …

In Re Chong Khian (Bankrupt) Kuching High Court No K45 of 1978 I held that the date of making of the fraudulent preference in favour of a creditor over other creditors under section 53(1) [BA] means the date of the registration of the said transfer at the Land Registry office. It is correct to point out that I was construing a provision of the Sarawak Land Code in that case. However, since the Sarawak Land Code and the [NLC] are substantially based on the Torrens system of Australia, I would adopt the same construction in construing the [NLC] in Peninsular Malaysia. Applying this rule of interpretation, it followed that all the three transfers of the first, second and third portions of the estate to the first respondent were made in November 1978. In other words, transfer of landed property was made when registered under the [NLC] and not when it was executed by the parties. …

In my opinion, the expression "within six months after the date of making (the transfers)" in section 53(1) is capable of being construed to mean: (a) before the expiration of six months after the date of making the transfers or (b) during the period of six months after the date of making the transfers.

I would prefer construction (a) which would have the effect of preventing any mischief which a bankrupt might be thinking of doing between the period of the presentation of the bankruptcy petition and the making of the adjudication order by the court.

I agree with the contention of learned counsel for the second appellant that the words "in favour of any creditor" means "in favour of any person claiming to be a creditor".

(emphasis added)

[30] Based on *Lian Keow Sdn Bhd (In liquidation)*, the SPA which is not an instrument of transfer, does not constitute a "conveyance" or "transfer" within the meaning of s. 53(1) BA. Furthermore, the SPA was executed on 5 August 2013, more than six months before the presentation of the winding up petition against the defendant on 27 March 2014. Accordingly, the SPA is not an undue preference in the plaintiff's favour under s. 293(1) CA.

A **Would Mr Lim Be Given Undue Preference?**

[31] According to the "letter dated 12 June 2014 from Messrs APH", the defendant owed RM270,000 to Mr Lim ('Mr Lim's debt'). The second prayer applied for a court order to allow the defendant to set off Mr Lim's debt from the price.

B

[32] In *Commercial Banking Co of Sydney Ltd v. George Hudsons Pty Ltd (in liquidation)* [1973] 2 ALR 1, at 5, Menzies J in the High Court of Australia held as follows:

> *It is a deeply rooted principle of company law that, when liquidation has commenced,*
C *one creditor should not be assisted by the Court to improve its position vis-a-vis other creditors.*
>
> (emphasis added)

Our CA is based on Australian legislation. Hence, Australian cases on company law are persuasive, especially when a matter in company law has
D been decided by the apex court in Australia, the High Court. In *Ooi Woon Chee & Anor v. Dato' See Teow Chuan & Ors And Other Appeals* [2012] 2 CLJ 501; at 523 and 526-527 (CLJ); [2012] 2 MLJ 713, at 732 and 734-735 (MLJ), our Federal Court has applied Australian cases in the context of compulsory winding up.

E

[33] I am of the view that if Prayer 2 is allowed, this will give Mr Lim an undue preference because Mr Lim's debts will be paid in priority over all the debts of the other unsecured creditors of the defendant. This will contravene the *pari passu* principle applicable to all unsecured creditors in a winding up. Accordingly, I cannot accede to Prayer 2.

F

[34] If the plaintiff has applied for leave of the winding up court to file the OS under s. 226(3)(a) CA, it is likely that the winding up court will not grant leave as Prayer 2 will contravene the *pari passu* principle to the detriment of all the other unsecured creditors of the defendant.

G **Can Prayer 1 Be Given?**

[35] Prayer 1 is essentially seeking for an order of specific performance of the SPA. The court has a discretion to grant an order of specific performance under s. 21(1) of the Specific Relief Act 1950 ('SRA'). Section 21(1) SRA reads as follows:

H

> 21.(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.
>
I (emphasis added).

Non-Joinder Of Bank

[36] According to the Court of Appeal's judgment in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520, at 540-541; [1995] 1 MLJ 719, at 746-747, the court may refer to a recital to a contract in the construction of the contract. Recital E clearly shows that the plaintiff has actual knowledge of the bank as an assignee of the parcel.

[37] Neither the plaintiff nor the defendant exhibit a copy of the assignment of the parcel from the defendant to the bank (assignment). Hence, the actual scope of the assignment cannot be ascertained in this case. Both parties do not dispute the existence of the assignment.

[38] The following appellate cases had held that assignments of properties to financial institutions as security for financing the purchase of such properties, constituted absolute assignments whereby the financial institutions were the equitable and beneficial owners of the properties in question:

(a) the Federal Court's judgment in *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231, at 234-235; [1984] 2 MLJ 268, at 270-271;

(b) the Supreme Court case of *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41, at 42-44; [1989] 2 MLJ 149, at 149-150 and 151; and

(c) the Federal Court's decision in *Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621; [2002] 2 MLJ 513, at 519-520.

[39] If the assignment in this case is absolute in nature, this means that the bank is the equitable and beneficial owner of the parcel. In such an instance, it may be argued by the bank that the defendant has no equitable and beneficial interest in the parcel to sell to the plaintiff. The issue of competing equitable interests may also arise. This is the first reason why the bank should have been made a party in the OS.

[40] There is a second reason why the bank's presence in the OS is important. If the defendant has defaulted on the loan provided by the bank ('defendant's default'), the bank has a contractual right to sell the parcel. There is every possibility of the defendant's default in view of the defendant's winding up.

[41] A third reason why the plaintiff should have cited the bank as a co-defendant in the OS, is that it is essential for both the plaintiff and defendant to know how much is still outstanding from the defendant to the bank so as to enable the bank to re-assign the parcel to the defendant.

[42] In view of the above three reasons, it cannot be denied that the bank is a relevant party in the OS within the meaning of the following provisions in RC:

(a) the bank "ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon" – O. 15 r. 6(2)(b)(i) RC; and/or

(b) there exists "a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the court, would be just and convenient to determine" as between the plaintiff, defendant and the bank – O. 15 r. 6(2)(b)(ii) RC.

Is Plaintiff A Bona Fide Purchaser Of Parcel For Valuable Consideration?

[43] The plaintiff has claimed to be a *bona fide* purchaser of the parcel for valuable consideration.

[44] The following cases have decided that if a party asserts that he or she is a *bona fide* purchaser of the property for valuable consideration, that party bears the burden of proof:

(a) the Federal Court's judgment in *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793, at 854;

(b) the Federal Court's decision in *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 LNS 96; [1971] 1 MLJ 224, at 227; and

(c) the Court of Appeal case of *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293, at 307.

[45] The above cases are fortified by s. 106 of the Evidence Act 1950 ('EA') which provides as follows:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Whether the plaintiff is a *bona fide* purchaser of the parcel for valuable consideration, is a matter which is "especially within the knowledge" of the plaintiff. As such, the onus is on the plaintiff to prove that he is a *bona fide* purchaser of the parcel for valuable consideration in accordance with s. 106 EA.

[46] This court finds that on a balance of probabilities, the plaintiff has failed to discharge the burden to prove that he is a *bona fide* purchaser of the parcel for valuable consideration. This is because there is no evidence that the plaintiff has entered a private caveat in respect of the parcel as provided in cl. 7.2. If the SPA is genuine, the plaintiff has a caveatable interest in the parcel under s. 323(1)(a) NLC as explained by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd*, at pp. 547-549 (CLJ); pp. 755-756 (MLJ), which entitles the plaintiff to enter a private caveat in respect of the parcel.

The failure on the plaintiff's part to enter a private caveat in respect of the parcel, casts a grave doubt on the *bona fides* of the plaintiff. In *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212, at 214, the Privy Council on an appeal from Malaysia, explained the importance of private caveat in the NLC by stating the following:

> **The system of private caveats is substituted for the equitable doctrine of notice in English land law**.
>
> (emphasis added)

The plaintiff was represented by Messrs APH in respect of the SPA. In fact, the first page of the SPA indicated that Messrs APH drafted the SPA. It is inconceivable for a genuine and reasonably prudent purchaser of real property who is legally represented, not to have entered a private caveat which is required by cl. 7.2 (presumably drafted by Messrs APH)!

Whether Court Should Exercise Discretion To Order Specific Performance Of SPA

[47] I have decided not to exercise discretion under s. 21(1) SRA to order a specific performance of the SPA. This decision is premised on the following reasons:

(a) to grant Prayer 1 without hearing the bank, is clearly unjust to the bank, especially if the assignment is an absolute one;

(b) the plaintiff has not adduced evidence that the SA's consent has been given to the SPA and the proposed transfer of the parcel from the defendant to the plaintiff. Nor did the plaintiff adduce evidence of any extension of the conditional period. With the defendant's winding up, s. 233(1) CA vests the parcel in the OR as explained by the Federal Court's decision in *K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBF Finance Bhd & Ors* [2005] 1 CLJ 793, at 805. The OR objects to the OS and is not expected to apply for the SA's consent.

The requirement of SA's consent is a "restriction in interest" ('RII') as defined in s. 5 NLC as follows:

> "restriction in interest" means any limitation imposed by the State Authority on any of the powers conferred on a proprietor by Part Nine, or on any of his powers of dealing under Division IV, and any like limitation imposed under any previous land law.

Section 214(2)(b) NLC expressly provides that the power of a registered proprietor to transfer land under s. 214(1) NLC "shall be exercisable in any particular case subject to" RII;

(c) as elaborated above, the plaintiff has failed to discharge the legal onus to prove that he a *bona fide* purchaser of the parcel for valuable consideration; and

(d) the plaintiff is guilty of inequitable conduct as follows:

(i) the plaintiff did not cite the bank as a co-defendant; and

(ii) Prayer 2 is made with the intention to give an undue preference to Mr Lim which contravenes the *pari passu* principle to the detriment of all the other unsecured creditors of the defendant.

In *Ang Hiok Seng v. Yim Yut Kiu* [1997] 1 CLJ 497 at 513-514; [1997] 2 MLJ 45, at 56, the Federal Court held as follows:

> The basis of the remedy of specific performance lies in equity and as such where – as in the present case – the appellant did not come with clean hands, the court was entitled in any event to refuse the remedy in order to protect the vendor from being a victim of sharp practice.

Third Prayer Should Not Be Granted

[48] If Prayers 1 and 2 are allowed, Prayer 3 will then be relevant. For reasons expressed above, this court cannot accede to Prayers 1 and 2. Hence, Prayer 3 which is consequential to Prayers 1 and 2, should therefore be dismissed.

Plaintiff Can File POD

[49] If the plaintiff is a *bona fide* creditor of the defendant, the plaintiff may file POD in respect of the deposit and the plaintiff's payments with the OR pursuant to r. 78 WUR ('plaintiff's POD'). The OR as the liquidator will then examine the plaintiff's POD in accordance with r. 92 WUR. If the OR rejects the plaintiff's POD, the plaintiff has a right of appeal to the winding up court under r. 93 WUR.

Effect Of Successful PO's

[50] For reasons stated above, I have decided that the two POs are well founded. I am of the view that the two POs support a dismissal of the OS despite O. 1A and O. 2 rr. 1(1), (2) and (3) RC. My view is based on the following reasons:

(a) there is no injustice if the OS is dismissed as:

(i) there is no evidence that the SA's consent has been obtained for the SPA and the proposed transfer of the parcel from the defendant to the plaintiff. Nor is there evidence of extension of the conditional period; and

(ii) the plaintiff has failed to prove on a balance of probabilities that he is a *bona fide* purchaser of the parcel for valuable consideration;

(b) there will be injustice in the following manner if the OS is allowed:

(i) there will be an injustice to the bank which has not been cited by the plaintiff as a co-defendant; and

(ii) there may be an undue preference in favour of Mr Lim which will infringe the *pari passu* principle to the detriment of all the other unsecured creditors of the defendant; and

(c) the two PO's do not concern a mere technical breach of RC. The two PO's involved the plaintiff's non-compliance with ss. 226(3) and 227(7) CA. As explained above, s. 226(3) CA has four purposes which should not be circumvented by the OS.

I have not overlooked s. 221(2)(b) CA and r. 194(1) WUR which confers power on a winding up court to "cure" non-compliance with CA and WUR provided that there is no substantial injustice. Firstly, this is not the winding up court which has wound up the defendant. In *GKM Amal Bhd v. Bank Utama (Malaysia) Bhd* [2004] 1 CLJ 769, at 772, and *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248, at 265, r. 194(1) WUR was used by the winding up court. As this is not the winding up court, I cannot exercise any "curing" power under s. 221(2)(b) CA and r. 194(1) WUR. More importantly, the fourfold purpose of s. 226(3) CA, in my view, cannot be unlawfully by-passed by reliance on s. 221(2)(b) CA and r. 194(1) WUR so as to cause injustice to all other unsecured creditors of the defendant.

Possible Conflict Of Interest

[51] The plaintiff was represented by Messrs APH in respect of the SPA. The letter dated 12 June 2014 from Messrs APH discloses a "disconcerting" fact – Messrs JPC have previously represented the defendant in respect of the transfer of the parcel from the developer to the defendant.

[52] If Messrs JPC have indeed acted previously for the defendant before the defendant's winding up, the following ethical considerations may arise:

(a) Messrs JPC would have confidential information or access to such information while acting for the defendant. Messrs JPC may be embarrassed within the meaning of r. 3(a) and (b)(i) of the Legal Profession (Practice and Etiquette) Rules 1978 ('LPR');

(b) it might be difficult for Messrs JPC to maintain their professional independence as required by the first limb of r. 5(a) LPR (please see the High Court case of *Paruvathy Palany v. Sathiasealan Govindasamy* [1999] 6 CLJ 113, at 120; [1999] 5 MLJ 151, at 160); and

(c) a counsel should not accept a brief if he or she would be embarrassed – r. 4 LPR (*Paruvathy*, at 121 (CLJ); 160 (MLJ)).

Court's Order

[53] The upshot is the OS is dismissed with costs to the OR.